

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

JENNIFER DIEKMAN,

Plaintiff,

vs.

Case No. 2005-1252-NI

THADDEUS JOSEPH WINIARSKI, JR.,

Defendant.

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OPINION AND ORDER

Defendant moves for summary disposition.

This is an auto negligence case. Plaintiff filed her complaint on March 29, 2005. Plaintiff alleges that on February 3, 2005, she was traveling northbound on Ryan Road, near the intersection of 15 Mile, when her vehicle was rear-ended by defendant. Plaintiff alleges she suffered serious impairment of a body function and serious disfigurement as a result. Defendant moves for summary disposition.

Defendant argues that there is a factual dispute regarding the nature and extent of plaintiff's injuries, but that dispute is not material to whether plaintiff suffered a serious impairment of body function. For purposes of this motion, defendant does not contest that an important body function was impaired. Instead, defendant contends summary disposition is appropriate because plaintiff's alleged impairment does not affect her general ability to lead her normal life. In this regard, defendant asserts that plaintiff chose to return to work with self-imposed limitations pertaining to the part-time hours she worked, and the alleged limitations were imposed without the necessity of a physician's medical review.



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In response, plaintiff first notes that during the accident, her nose struck the steering wheel before the air bag deployed. Plaintiff asserts her vehicle was "totaled" as a result of the accident. Plaintiff avers her mother took her to the hospital after the accident, where she complained of nose, neck and back pain. Plaintiff was prescribed Vicodin and Valium and given a neck brace. Plaintiff asserts she was bedridden for approximately two to three weeks after the accident, then she went to see Dr. Brent Smith at the Urgent Care Clinic, where she was treated for complaints of headaches and neck pain. Plaintiff alleges she was prescribed physical therapy for her injuries and more pain medication; plaintiff avers she still treats with Dr. Smith monthly for pain medication. Plaintiff alleges she suffers from migraines, which she did not have before the accident, as well as neck and shoulder pain extending into the top of her back.

Plaintiff further notes that she had been employed as a dancer before the accident, and worked approximately 40 hours per week, six to seven days per week. Plaintiff contends she did not work at all for one month immediately following the accident, and only worked two to three days a week for four to five hours a day when she did return to work. Plaintiff avers that she was not able to do any "pole tricks" while she was on stage dancing after the accident because her neck and back were not able to bend properly. Plaintiff further alleges that she has suffered short term memory loss and a loss of concentration since the accident. Additionally, plaintiff alleges she has become depressed and irritable, and suffers from mood swings and a decrease in general. Plaintiff asserts that an MRI taken on February 26, 2005, reflects a broad disc/spur complex at C5/C6 without canal narrowing or cord compression. Plaintiff alleges she was examined on February 6, 2006, and diagnosed with having a closed head injury, left C5 radiculopathy, thoracic spine pain and adjustment reaction with depressed mood.

Plaintiff contends that her ability to lead her normal life has been affected by the accident. Viewing the evidence in the light most favorable to her, plaintiff asserts, the injuries sustained by plaintiff have rendered her unable to perform her employment fully and have affected both her physical and emotional health.

Defendant moves for summary disposition pursuant to MCR 2.116(C)(10). A (C)(10) motion tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. *By Lo Oil Co v Department of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005). The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence. *By Lo Oil*, 26. The trial court is required to consider the submitted documentary evidence in the light most favorable to the party opposing the motion. *By Lo Oil Co*, 26. If the moving party satisfies its burden of production, the motion is properly granted if the opposing party fails to proffer legally admissible evidence that demonstrates that a genuine issue of material fact remains for trial. *By Lo Oil Co*, 26-27.

The Supreme Court provided a framework for determining whether a plaintiff meets the serious impairment threshold under MCL 500.3135 in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). First, a court is to determine whether a factual dispute exists “concerning the nature and extent of the person’s injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function.” *Kreiner*, 131-132. In determining the “nature” of plaintiff’s injuries, the trial court should find whether plaintiff has an “objectively manifested” impairment and, if so, whether “an important body function” is impaired. In determining the “extent” of plaintiff’s injuries, the trial court should find whether the impairment affects plaintiff’s “general ability to lead his . . . normal

life.” *May v Sommerfield*, 239 Mich App 197, 202-203; 607 NW2d 422 (1999). If there are material factual disputes, a court may not decide the issue as a matter of law. If no material question of fact exists regarding the nature and extent of the plaintiff’s injuries, the question is one of law. *Kreiner*, 132.

When a court decides the issue as a matter of law, it must then proceed to the second step in the analysis and determine whether “an ‘important body function’ of the plaintiff has been impaired.” *Kreiner*, 132. When a court finds an objectively manifested impairment of an important body function, “it then must determine if the impairment affects the plaintiff’s general ability to lead his or her normal life.” *Kreiner*, 132. This involves an examination of the plaintiff’s life before and after the accident. *Kreiner*, 133.

In *Kreiner*, the Supreme Court explained that, in determining “whether an impairment affects a person’s ‘general,’ i.e., overall, ability to lead his normal life,” the starting point “should be identifying how his life has been affected, by how much, and for how long.” In this regard, “not all activities have the same significance in a person’s overall life,” and despite “minor changes” in the performance of a specific activity, one “may still ‘generally’ be able to perform that activity.” *Kreiner*, 131. The Court must “compare[ ] the plaintiff’s life before and after the accident as well as the significance of any affected aspects on the course of plaintiff’s overall life,” and engage in an “objective analysis regarding whether any difference between plaintiff’s pre- and post-accident lifestyle has actually affected the plaintiff’s ‘general ability’ to conduct the course of his life.” *Kreiner*, 132-133. “Merely ‘any effect’ on the plaintiff’s life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff’s ‘general ability’ to lead his life.” *Kreiner*, 133. Moreover “[a] negative effect on a particular

aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Kreiner*, 137.

The Court is not persuaded that plaintiff has created a genuine issue of material fact that the injuries affected the general ability to lead her normal life as contemplated by *Kreiner*. Plaintiff testified that for approximately one year before the accident she worked as a dancer at a location called Player's. (Tr 6) The work was full-time on and off, six or seven days a week, depending on if she needed the money. (Tr 6) Plaintiff testified that she did not work for one month following the accident although she could not recall whether that was from a doctor excusing her from her employment or whether it was her own decision not to work. (Tr 7) Plaintiff resumed her work as a dancer but did not perform the same activities as a dancer as before. After the accident, plaintiff testified, she worked 2 to 3 days per week. (Tr 8) Plaintiff testified that her stage performance changed, as she was no longer able to do "pole tricks." (Tr 14-15) Additionally, plaintiff testified that before the accident she would do more dancing whereas after she would walk around. (Tr 15) Plaintiff indicated that she was able to resume other work activities after the accident as before, such as lap dances. (Tr 17) When discussing medical treatment, plaintiff testified that she received medication and the directive to have physical therapy. (Tr 27-32) Plaintiff did not testify that her doctor ever restricted any of her activities, work-related or otherwise. (Tr 27-52) Plaintiff further testified that she has short term memory loss, which she did not have before the accident, as well as mood changes, including irritability, and an inability to multi-task. (Tr 56) Plaintiff did not testify as to what changed in her life besides work after the accident. (Tr 57)

The other exhibits, besides her transcript excerpts, that plaintiff attaches to her brief are a letter from Bio-Magnetic Resonance, Inc., dated February 26, 2005, who writes that MR findings

are normal, and there was a normal examination of the brain. (Ex B) The final exhibit plaintiff attaches is a letter from the Michigan Neurology Institute-East, PC, dated February 6, 2006. (Ex C) It reads that plaintiff has a broad disc spur complex at the C5/6 level, and that her symptoms have worsened since the last MRI was done. The report further reads that it appears that plaintiff has a closed head injury. In a supplemental brief, plaintiff attaches the results of an MRI exam taken on April 12, 2006, which reads that there is a paracentral disc herniation at C5-C6, and a mild disc bulge at C4-C5; the remainder of the scan is unremarkable. (Ex A) Additionally, plaintiff attaches a physical therapy outpatient evaluation dated April 19, 2006, which notes that plaintiff is current not working due to her situation. (Ex B)

The thrust of plaintiff's brief is that the residual pain she experienced kept her from working, thus constituting a change in the course or trajectory of her life. As the Court in *Kreiner* determined, while there may exist a medically identifiable or physiological basis for the pain, self-imposed restrictions because of pain, in and of themselves, fail because there is no medical expertise supporting the restrictions, which expertise would, in all likelihood, take into consideration the source of the pain before restrictions are imposed. *Kreiner*, 133, n 17; *McDaniel v Hemker*, 268 Mich App 269, 284; 707 NW2d 211 (2005). "[T]he extent of this residual impairment cannot be proven by way of self-imposed restrictions based on real or perceived pain. Stated differently, [plaintiff] cannot establish the extent of [his] residual impairment by merely claiming that [he] has restricted [himself] from engaging in activities or making certain movements because [he] experiences pain." *McDaniel*, 283.

Here, plaintiff's decision not to work after the accident, and her subsequent decision to reduce her hours and the specific physical moves in her work, were self-imposed restrictions, and for that reason are inadequate to establish residual impairment. Plaintiff presents no physician-

imposed work restrictions, at any time. Moreover, plaintiff has not produced deposition testimony or other evidence to show that other aspects of her life actually have been affected by the accident such that it changed the course and trajectory of her life. Because the evidence failed to show that the impairment affected plaintiff's general ability to conduct the course of her normal life, a factual dispute concerning the nature and extent of her injuries is not material to the determination whether she suffered a serious impairment of body function. Therefore, summary disposition is properly granted in favor of defendant.

For the foregoing reasons, defendant's motion for summary disposition is GRANTED. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* resolves the last pending claim and closes this case.

IT IS SO ORDERED.

Dated: May 19, 2006

DONALD G. MILLER  
Circuit Court Judge

CC: David M. Moss  
David R. Tuffley

DONALD G. MILLER  
CIRCUIT JUDGE

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A TRUE COPY  
CARMELLA SABAUGH, COUNTY CLERK

BY:  Court Clerk